in such prior action it has been deducted.[11] Although the use of the pledge has been tortious, the pledge is answerable but only in an action[12] (including, of course, cross action and recoupment). The damages go only to the extent of the injury to the pledgor's rights in the pledge subject to the pledgee's special property at the time of the conversion.[13] So, if the pledgor desires to avail himself, *via* defense, of the advantage of the pledgee's tort or default, he is limited to his actual loss; if he desires to recover for the conversion he departs from the contract relation, and is thereby put to separate action.[14]

Nor can the tort of the pledgee be said to be a sufficient justification for depriving the pledgor or where he is insolvent, his assignee of the rights accruing under the principal obligation.[15] The mere fact that the contract has proved to be a poor bargain from the debtor's point of view, has never operated in the eyes of the law to relieve him from performance.

Nor is there anything favorable to the rule to be gathered from the theory that a pledgee is a trustee of the pledge. That theory, while apparently sufficient to define the status of the pledgee with regard to the property,[16] is not tenable in that it fails to account for and include the larger rights and liabilities of the parties with regard to the principal obligation or indebtedness.

J. C. A.

CONTRACTS IN RESTRAINT OF TRADE—LABOR UNIONS—The hat manufacturers of a certain town and vicinity, acting in concert, entered into an agreement with a labor union not to employ any but union labor. The plaintiff, being dropped from the rolls of the local union, was discharged from the employment of one of the manufacturers in pursuance of the agreement, at the instigation of the defendants. The court held that the agreement was contrary to public policy where it embraced an entire industry of any considerable proportion in the community, so that it would operate generally in that community to prevent or to seriously deter craftsmen from working at their trade under favorable conditions without

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[11] Ratcliff v. Davis, Yelv. 179 (abt. 1600); Bac, Abridg. "Bailment," B. The rule obtains in both common and civil law, Story on Bailments, §§315, 316.

[12] Thompson v. Patrick, *supra,* n. 4, and ruling further that after a conversion by the pledgee, should the pledgor surreptitiously get possession of the pledge, he cannot hold it as against the pledgee, or his assignees.

[13] Johnson v. Stear, *supra,* n. 3.

[14] Stearns v. Marsh, 4 Denio, 227 (N. Y. 1847); Bulkley v. Welsh, 31 Conn. 339 (1863).

[15] Judgments upon contracts, it is submitted, are by policy of the common law remedial, not punitive.

[16] Jones on Collat. Security, 393; Felton v. Brooks, 4 Cush. 203 (Mass. 1849); McCrea v. Yule, 68 N. J. L. 465 (1902).

joining a union; hence the agreement was no justification to the defendants for inducing the plaintiff's discharge.[1]

The cases as to liability for causing the discharge of an employee divide themselves into two classes: (a) those cases where the discharge is procured by means of threats, coercion, *etc.*,[2] and (b) those where the discharge is the result of an agreement previously entered into. Only the cases falling within the second class, of which the principal case is one, will be treated in this note.

Contracts between an employer or an association of employers and a labor union, providing for the employment of members of the union only, are of very recent origin, and the decisions in respect to their validity few in number and not altogether harmonious.

In the earliest case on the question[3] it was held that such a contract was no defense for representatives of the union in an action brought against them individually by a non-union man for damages for procuring his discharge in accordance with the "closed shop" agreement because the contract was against public policy and void. Here the agreement was between the union and an *association of employers*. In the next case,[4] on substantially the same facts, the court held the contract to be consonant with public policy, and valid. The court says that *Curran* v. *Galen*[5] "stands unaffected as authority" and bases its decision on the distinction that in *Curran* v. *Galen* there was an *association of employers,* while in *Jacobs* v. *Cohen*[6] there was but a *single employer* in the agreement; arguing that if the agreement was not such as embraced an entire industry or if it did not operate generally in the community to prevent such craftsmen from obtaining any employment then it is lawful and not void as against public policy. These two cases are followed in *Mills* v. *United States Printing Co.*[7] and in *McCord* v. *Thompson-Starrett Co.*[8] and would seem to crystallize the New York law into two rules: (a) a contract, between an association of all (or practically all) the employers of labor engaged in the same line of business in a single community, by which it is agreed that the employees of the individuals composing the association shall be exclusively members of the union, is against public policy and void, but (b) that a con-

[1] Connors v. Connolly *et al.,* 86 Atl. Rep. 600 (Conn. 1913).

[2] This class of cases is treated very exhaustively by Prof. Jeremiah Smith, of the Harvard Law School, in 20 HARVARD LAW REVIEW, 253, 345, 428 (1907). See also an article by Dr. William Draper Lewis, Dean of the Law School of the University of Pennsylvania, in 18 HARVARD LAW REVIEW, 444 (1905).

[3] Curran v. Galen, 152 N. Y. 33 (1897).

[4] Jacobs v. Cohen, 183 N. Y. 207 (1905).

[5] *Supra,* n. 3.

[6] *Supra,* n. 4.

[7] 99 N. Y. App. Div. 605 (1904).

[8] 129 N. Y. App. Div. 130 (1908).

tract, between an individual employer and a labor union, by which the employer binds himself to employ and retain in his employ only workmen who are members of the union and only such members as are in good standing, is not against public policy and is valid. As is seen from the principal case, Connecticut apparently has adopted these rules; or it might be more accurate to say it has adopted the first of these rules, since the facts of the case fall within that rule. Yet from the language and the spirit of the decision it is gathered, that it would adopt the second rule if facts were presented to them which demanded a decision on this point.

In *Brennan* v. *United Hatters of North America*,[9] the New Jersey Courts made no adjudication in respect to such a contract, it being unnecessary to the decision in the case but the substance of the decision in *Curran* v. *Galen*[10] and *Jacobs* v. *Cohen*,[11] was stated and it was said: "Whether these decisions are consistent with each other is a question that may require consideration at a future time."

In *Curran* v. *Galen*, the court bases its opinion on the fundamental principle that while it is perfectly lawful to combine for such legitimate purposes as to obtain an advance in the rate of compensation, or to maintain such rate, or to better working conditions; yet such combinations cease to be lawful when they are so extended in their operation as either to intend, or to accomplish, injury to others. When the operations of an organization are such as to promote the common good of its members, they are legitimate instrumentalities, but when they militate against the general public interest by directing their powers toward the repression of individual freedom they cannot be justified. The justification of this latter class of operations would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. In *Jacobs* v. *Cohen* the court nullifies to a large extent the fundamental principle laid down in *Curran* v. *Galen* and seems to, in a measure at least, shift the grounds of the decision. It is submitted that, while the distinction on the facts between the two cases is perfectly evident, yet the reasoning of the court as to why a different legal conclusion should result is not clear or convincing. A vigorous dissenting opinion was handed down by two members of the court.

The Supreme Court of Massachusetts in *Berry* v. *Donovan*[12] in an elaborate opinion expressly approved *Curran* v. *Galen*, and in adopting the principles there expressed elaborated on them. In the course of the opinion it was pointed out that contracts, the object of which is to compel a workman to join a union, cannot be justified as legitimate competition between workmen, but on the other hand tend to prevent such competition and to foster monopoly. It

[9] 73 N. J. L. 729, 65 Atl. Rep. 165 (1906).
[10] 152 N. Y. 33 (1897).
[11] 183 N. Y. 207 (1905).
[12] 188 Mass. 353, 74 N. E. Rep. 603 (1905).

is no legal objection to action whose direct effect is helpful to one of the parties in the struggle, that it is also directly detrimental to the other. But when action is directed against the other, primarily for the purpose of doing him harm and thus compelling him to yield to the demand of the actor, and this action does not directly affect the property, or business or status of the actor, the case is different, even if the actor expects to derive a remote or indirect benefit from the act. The gain which a labor union may expect to derive from inducing others to join it, is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business, such as to justify the infliction of injury upon a third person for the purpose of obtaining it.

C. McA. S.

CORPORATIONS—STOCKHOLDERS' LIABILITY FOR UNPAID SUBSCRIPTIONS—It is well settled that upon the insolvency of a corporation, its creditors may, in a proper proceeding in equity, reach and apply, to the payment of their claims, any unpaid balances to the subscription of the capital stock of the corporation.[1] A recent California decision[2] has once more stated this proposition.

Although this principle can be said to be practically universal, the American courts are not, however, in accord as to the doctrine or theory to be applied in deciding cases arising under it. Three important doctrines, generally followed by the different jurisdictions, have thus far been brought forward by the Federal,[3] Minnesota[4] and Missouri[5] courts, respectively.

The Federal courts apply in these cases the so-called Trust-Fund Theory, based on a *dictum* of Judge Story in *Wood* v. *Dummer*,[6] to the effect that the capital stock of a corporation constitutes a "trust-fund" for the payment of corporate debts. Under this doctrine, no part of the capital of the corporation can be law-

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[1] Sawyer v. Hoag, 17 Wall. 610 (U. S. 1873); Upton v. Tribilcock, 91 U. S. 45 (1875); Hospes v. Manufacturing Co., 48 Minn. 174 (1889); 4 Thompson on Corporations (2nd Ed.), §4935.

[2] Herron Co. v. Shaw, 133 Pac. Rep. 488 (Cal. 1913).

[3] Sawyer v. Hoag, *supra*, n. 1.

[4] Hospes v. Manufacturing Co., *supra*, n. 1.

[5] Chrisman-Sawyer Banking Co. v. Wool Manufacturing Co., 168 Mo. 634 (1902).

[6] 3 Mason's Reports, 308 (U. S. 1824). In this case a bank had divided its capital stock as dividends among its stockholders without paying its creditors, the bank note holders. The creditors brought a bill against the stockholders for the payment of their notes. Judge Story *inter alia* said, "The capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank." This statement was unnecessary, as the bank's acts were fraudulent and void as against its creditors.